Nos. 83-1065, 83-1240

IN THE

# Supreme Court of the United States



October Term, 1983

THE COUNTY OF ONEIDA, NEW YORK, *et al.*,
*Petitioners,*

*vs.*

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
*Respondents.*

THE STATE OF NEW YORK,
*Petitioner,*

*vs.*

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
*Respondents.*

**On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.**

## BRIEF OF AMICI CURIAE CITY OF ESCONDIDO, ESCONDIDO MUTUAL WATER COMPANY, AND VISTA IRRIGATION DISTRICT IN SUPPORT OF PETITIONERS.

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## BRIEF OF AMICI CURIAE CITY OF ESCONDIDO, ESCONDIDO MUTUAL WATER COMPANY, AND VISTA IRRIGATION DISTRICT IN SUPPORT OF PETITIONERS.

### Interest of Amici Curiae.

Amici are the City of Escondido, Escondido Mutual Water Company and Vista Irrigation District. This brief is in support of Petitioners Counties of Oneida and Madson, New York and the State of New York.[1]

[1]Pursuant to Rule 36.2 Amici have filed letters of consent from all parties with the Clerk of this Court.

Amici are defendants in a suit brought by five Mission Indian Bands and the Secretary of the Interior: *Rincon Band, et al. v. Escondido Mutual Water Co., et al.*, U.S. Dist. Ct., S.D. Cal. Nos. 69-217-S, 72-271-S and 72-276-S. The Bands and Interior seek to void certain water and right-of-way contracts and permits, and request declaratory and injunctive relief in addition to millions of dollars in damages for alleged breaches of contract, trespasses and wrongful diversion of Indian water dating from 1895.[2]

A dispositive issue in that case[3] is similar to one here — whether the claims are barred by applicable statutes of limitations or equitable doctrines such as laches.

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[2]The controversy is being waged in two additional fora: (1) *Rincon, et al. Bands of Indians v. United States*, Claims Court Docket 80-A (suit seeking damages for violation of Indian water rights); and (2) *Escondido Mutual Water Co., et al. v. La Jolla Band of Mission Indians* (1984) ___ U.S. ___, 52 U.S.L.W. 4588 (dispute over Federal Energy Regulatory Commission's jurisdiction to license federal power project which crosses Indian lands).

[3]On January 10, 1980, the district court granted partial summary judgment ruling that "The affirmative defenses of estoppel, laches, waiver, federal and state statutes of limitations, adverse possession, prescription and acquiescence . . . are insufficient as a matter of law."

Although the district court ruled that its decision involved "controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," the United States Court of Appeals for the Ninth Circuit did not permit an interlocutory appeal.



## Summary of Argument.

The Oneidas' 175-year-old claims are time-barred. Contrary to the Second Circuit's implication, Indian tribes are subject to applicable federal or state statutes of limitations. The only issue is which statute applies. Here, where there is no express federal limitations statute (28 U.S.C. § 2415 is not applicable), the Oneidas' claims are subject to applicable borrowed state statutes of limitations. Application of the state limitations period in this case would not be anomalous or inconsistent with the federal policies underlying the 1793 Non-Intercourse Act.

Moreover, these claims are barred by equitable defenses such as laches. The 175-year delay is patently unreasonable and has prejudiced numerous innocent third parties.[4]

## ARGUMENT.

### I.
### THE ONEIDAS' CLAIMS ARE BARRED BY APPLICABLE STATE STATUTES OF LIMITATIONS.

The Second Circuit's refusal to apply the applicable state statute of limitations to the Oneidas' claims (Joint Appendix (JA) 232a-33a) was based on three erroneous assumptions: (1) statutes of limitations never run against Indian land claims; (2) borrowing the state limitations statute would be inconsistent with the federal policies underlying the 1793 Non-Intercourse Act[5]; and, (3) because 28 U.S.C. section 2415 would be the appropriate limitations statute in a suit brought by the United States, it would be anomalous to apply a different limitations statute to the Oneidas' claims.

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[4]Although Amici believe that the Second Circuit also erred in its other holdings, they are briefing only the issue of whether the Oneidas' claims are time-barred.

[5]Act of March 1, 1793, 1 Stat. 329.

Indian land claims, however, are subject to applicable federal or state statutes of limitations. The only issue is which limitations period applies. This issue is resolved by identifying an express federal limitations statute, or in its absence, borrowing the most analogous state limitations statute. Here there is no express federal limitations statute. Both the express language of 28 U.S.C. section 2415 and its legislative history confirm that it was to apply only to the United States — not to Indians or Indian tribes. Accordingly, the Oneidas' claims are subject to the applicable borrowed state statute of limitations.

Contrary to the Second Circuit's holding, application of a state limitations statute would not be inconsistent with the federal policies underlying the 1793 Act. Nor would it be anomalous to apply a limitations period to the tribes' claim that is different from that which would be applied to a similar suit brought by the United States.

**A. Indian Claims Are Subject to Statutes of Limitations.**

**1. Indian Claims Are Subject to Federal Statutes of Limitations.**

Courts always have held that *applicable* federal statutes of limitations bar Indian claims. *See, e.g., Barker v. Harvey* (1901) 181 U.S. 481, 490 (Mission Indian land claims barred because not presented to the Federal Land Commission within the two-year period required by the Act of March 3, 1851, 9 Stat. 631); *Super v. Work* (1925 D.C. Cir.) 3 F.2d 90, *aff'd. per curiam* (1926) 271 U.S. 643 (Karok Tribe land claims dismissed for failure to file claims pursuant to the Act of March 3, 1851); *Capoeman v. United States* (1971 Ct. Cl.) 440 F.2d 1002, 1004 (individual Indian's suit to recover charges made by the government incident to its sale of timber on plaintiffs' trust allotment barred by 28 U.S.C. section 2501); *Andrade v. United States* (1973 Ct. Cl.) 485 F.2d 660, *cert.*



*denied* (1974) 419 U.S. 83 (Pitt River Tribe's suit to overthrow a 1964 Indian Claims Commission judgment barred by the six-year statute of limitations of 28 U.S.C. section 2501); *Hydaburg Co-op Ass'n v. United States* (1981 Ct. Cl.) 667 F.2d 64, 69-70, *cert. denied* (1982) 459 U.S. 905 (Chartered Indian corporation's claims for mismanagement of cannery operation barred by 28 U.S.C. section 2501); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.* (1982 5th Cir.) 690 F.2d 1157, 1169, *cert. denied* (1983) ___ U.S. ___, 78 L.Ed.2d 83 (Tribal land claims barred for failure to file claims under the Act of March 2, 1805, 2 Stat. 324 et seq.); *Menominee Tribe of Indians v. United States* (1984 Fed. Cir.) 726 F.2d 718, 720-22 (action for mismanagement of tribe's forest resources barred by 28 U.S.C. section 2501).

*See also Mann v. United States* (1968 9th Cir.) 399 F.2d 672, 673, where the court rejected a Navajo Indian's argument that the 28 U.S.C. section 2401's two-year period should not apply to him because he was an Indian and a ward of the government.

Congress has recognized that statutes of limitations apply to Indians and on several occasions has expressly modified or waived statutes of limitations for Indians. *See, e.g.*, Indian Claims Commission Act § 70a, 60 Stat. 1049 (former 25 U.S.C. § 70a) which authorized the Commission to hear claims accruing before August 13, 1946 "on behalf of any Indian tribe band or other identifiable group of American Indians . . . notwithstanding any statute of limitation or laches."[6]

The Indian Claims Commission Act itself required that all claims be filed on or before August 13, 1951, section 70k (former 25 U.S.C. § 70k). *See, e.g., Navajo Tribe of Indians v. United States* (1979 Ct. Cl.) 601 F.2d 536

[6]Other federal statutes have waived statutes of limitations for Indians. *See Federal Indian Law* (1958 Dept. of Int.) 351 n.52.

(tribal claims withdrawn after 1951 could not be refiled and were barred by section 70k).

**2. Indian Claims Are Subject to State Statutes of Limitations.**

Courts also have held that state statutes of limitations can bar Indian claims. In *Seneca Nation v. Christy* (1896) 162 U.S. 283, the Seneca Nation sued in state court for damages and to recover possession of land taken from them in 1826 pursuant to certain treaties and compacts. The defendant argued, *inter alia,* that the action was barred by a New York statute of limitations. The trial court ruled for defendants and the New York Court of Appeals affirmed.

On writ of error, the United States Supreme Court affirmed, and quoted from the Court of Appeals' opinion:

> "We are also of opinion that [sic because] the right of the plaintiff to sue was given by and is dependent upon the statute, chapter 150 of the Laws of 1845 (*see Strang v. Waterman,* 11 Paige, 607) the statute of limitations is a bar to the action." 162 U.S. at 288.

Other cases applying state statutes of limitations to Indian claims include: *Schrimpscher v. Stockton* (1902) 183 U.S. 290, 296-97 (where treaty made Indians citizens[7] and subject to the laws of Kansas, individual heirs of Indian were barred by state statute of limitations from recovering tract of land); *Stewart v. Keyes* (1935) 295 U.S. 403, 416-17 (suit by Creek Indians to recover land was barred by Oklahoma statute of limitations, and to the extent that Act of April 12, 1926, 44 Stat. 239, purported to extend statute of limitations for Indians it was void as a denial of due process); *Wolfe v. Phillips* (1949 10th Cir.) 172 F.2d 481, 484-86, *cert. denied* (1949) 336 U.S. 968 (where Act of April 12, 1926, 44 Stat. 239, made Indians of five civilized tribes subject to the Oklahoma statute of

[7]The Act of June 2, 1924, 43 Stat. 253, made all Indians citizens of the United States.



limitations, their suit to recover possession of land was barred by state statute of limitations); *see also Lamont v. Haig* (1982 D. S.Dak.) 539 F. Supp. 552, 557 n.4 (where federal common law cause of action for violation of constitutional rights was not subject to express federal statute of limitations court looked to analogous state statute of limitations to determine whether Indians' claims were barred).

Thus, the real issue is not whether statutes of limitations can bar Indian claims, but rather which statute — federal or state — applies to a given claim.

**B. Because No Federal Statute of Limitations Expressly Applies to the Oneidas' Claims, the Court Should Apply the Applicable State Limitations Period.**

No express federal statute of limitations applies to these Indian claims. The 1793 Act neither expressly creates nor limits any private cause of action. Its penalties and disabilities, however, do expressly abate after two years. (*See* Appendix to Counties', Petition for Certiorari (PA) 58a)

Contrary to the Second Circuit's implication (JA 232a-33a), 28 U.S.C. section 2415 does not apply to claims brought by Indian tribes. Both its express language and its legislative history confirm that it was intended to apply only to claims brought by the United States, and not to claims brought by Indians themselves, even if they *could* have been brought by the United States.

**1. 28 U.S.C. Section 2415 Does Not Apply to the Oneidas' Claims.**

**a.** ***Section 2415 Was Not Intended to Apply to Claims Brought by Indian Tribes.***

On its face, section 2415 applies certain limitation periods only to actions "brought by the United States" (PA 70a-72a).

Congress' intent in enacting section 2415 in 1966 was for the first time to establish statutes of limitations generally applicable to actions brought by the United States.[8] *Crown Coat Front Co. v. United States* (1967) 386 U.S. 503, 521 n.4; Hearings on H.R. 13652 before Subcomm. No. 2 of the House Comm. on the Judiciary, 89th Cong., 2d Sess. 3-4 (1966); H.R. No. 1534, 89th Cong., 2d Sess. 3-4 (1966).

As originally enacted, section 2415 did not expressly apply to suits brought by the United States on behalf of Indians; however, it did limit suits by the United States "to recover damages from a trespass on lands of the United States, including trust and restricted Indian lands" to a six-year period.[9]

On July 18, 1972, Congress passed an emergency bill (Pub.L. 92-353, 86 Stat. 499) which: (a) made the original six-year limitation periods expressly applicable to actions for money damages (§ 2415(a)) and trespass damages (§ 2415(b)) brought by the United States "on behalf of a recognized tribe, band or group of American Indians"; and (b) extended the periods for an additional ninety days. The ninety-day extension prevented expira-

[8]Prior to its passage, unlike the situation in regard to Indian claims (*see, supra*), statutes of limitations generally had been held inapplicable to the United States when it sued to assert public or governmental as opposed to private rights. *United States v. Summerlin* (1940) 310 U.S. 414, 416.

The United States has been held subject to statutes of limitations where it: (a) sues as a nominal plaintiff to vindicate purely private rights (*see, e.g., United States v. Beebe* (1888) 127 U.S. 338); (b) brings an action under a state statute which creates a right which did not exist at common law and specifies a limitations period (*see, e.g., United States v. Harpootlian* (1928 2d Cir.) 24 F.2d 646); and, (c) sues to protect its proprietary as opposed to public rights. (*See, e.g., United States v. Summerlin, supra.*)

[9]28 U.S.C. section 2415(g) deemed the right of action to have accrued on the date of enactment (*i.e.*, July 18, 1966). Thus claims by the United States would not have been barred until six years later (*i.e.*, July 18, 1972).



tion of the original limitations periods pending consideration of other bills which had been introduced which would further extend the periods. In explaining the need for the ninety-day extension, Senator Jackson appended to his remarks a July 14, 1972 Wall Street Journal article which noted that expiration of the limitations period:

> "would prevent the government from seeking payment for damages more than six years old. Interest accrued in such cases can be substantial, since Indian cases sometimes go back 100 years or more. Whether Indians could file their own suits for financial damages going back more than six years is unclear, says a legal official in the Department of the Interior. The issue will probably have to be settled in the courts." 118 Cong. Rec. 23,966 (1972)

Thereafter, during hearings on a five-year extension before the Subcommittee on Indian Affairs, William A. Gershuny, Associate Solicitor for Indian Affairs, testified:

> One of the reasons, Senator, why it's so essential that the suits be filed, that some claims be filed by the United States, is the possibility that if the tribe itself in its own name files the suit it would be subject to a shorter statute of limitations than would otherwise be applicable to the Federal Government.

Hearings on S. 3377 and H.R. 13825 Before the Subcomm. of Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong. 2d Sess. 18-19 (1972).

In concluding his testimony, Gershuny commented on a suggestion that section 2415 be amended to apply to actions brought, not only by the United States, but by the Indians themselves:

> Senator Fanin. . . . The legal services suggest that the words "United States for or on behalf of" be stricken,

on the theory that should a cause of action be extended they [Indians] could bring action on their own.....

Mr. Gershuny. I have not seen that [suggestion] before, but it would seem to me, Senator, that *their proposal is based on the erroneous assumption that Section 2415 is a statute of limitations, which would apply to the tribe if it filed its own suit.* We don't read Section 2415 that way. I have a lot of difficulty in understanding how 2415 could be applicable if the tribe itself filed suit. My first reaction, Senator, is that I think that the proposal is simply bottomed on a false assumption. *Id.* at 23. (emphasis added.)

On October 13, 1972, Pub. L. 92-485, 86 Stat. 803, was enacted extending the time for the United States to bring Indian money and trespass claims until July 18, 1977 Congress subsequently enacted other extensions.[10]

Congressional debates over these various extensions confirm that Congress did not intend section 2415 to apply to claims brought by the Indians themselves. *See, e.g.*, 123 Cong. Rec. 22499 (1977) (remarks of Rep. Cohen, ... "this bill does not deal with the issue of suits by Indian tribes"); *Id.* at 22511 (remarks of Rep. Udall, "Not once during consideration of [section 2415] was the issue of Indian claims against third parties raised and no Indian witnesses were heard. In fact, it is doubtful that Congress even intended that the act would apply to such Indian claims."); H.R. Rep. No. 96-87, 96th Cong., 2d Sess.

[10]On July 11, 1977, Congress enacted Pub.L. 95-64, 91 Stat. 268, extending the time periods to August 18, 1977. On August 15, 1977, Congress enacted Pub.L. 95-103, 91 Stat. 842 extending the time periods to April 1, 1980. On March 27, 1980, Congress enacted Pub.L. 96-217, 94 Stat. 126 extending the time periods to December 31, 1982. On December 30, 1982, Congress enacted Pub.L. 97-394, 96 Stat. 1976, which established the current time periods.



(1980) ("The claims concerning Indians and Indian tribes which are affected by Section 2415 ... are brought by the United States as trustee on behalf of the Indians. The Indians themselves do not bring such actions on their own behalf.")[11]

Thus, the legislative history of section 2415 and its amendments clearly shows that Congress had no intention to extend its benefits to suits brought by Indian tribes or bands.

28 U.S.C. section 2416 is further evidence that Congress did not intend section 2415 to apply to Indian tribes. Section 2416 establishes certain exclusions from the time period specified by section 2415 including those periods of time when the United States cannot be reasonably charged with knowledge of the requisite material facts. No such exclusion, however, is made for Indian tribes.

b. *There Is Nothing Anomalous in Applying Different Limitations Statutes to Indian Tribes and the United States.*

Despite section 2415's express language and legislative history, the Second Circuit erroneously concluded that it would be anomalous to allow the United States as trustee to sue under more favorable conditions than those afforded the tribes themselves. (JA 232a).[12] This holding

[11]See also 123 Cong. Rec. at 22500 (remarks of Rep. Foley); *Id.* at 22507 (remarks of Rep. Dicks); *Id.* at 22510 (remarks of Rep. Yates); 126 Cong. Rec. H1945 (1980) (remarks of Reps. Danielson and Marlenee); *Id.* at S1641 (remarks of Sen. Melcher); *Id.* at S1642 (remarks of Sen. Cohen); but *cf.* S. Rep. No. 96-569, 96th Cong., 2d Sess. (1980) 4.

[12]The courts which have reached similar conclusions (see *e.g. Capitan Grande Band of Mission Indians v. Helix Irrigation District* (1975 9th Cir.) 514 F.2d 465, 469-71, *cert. denied* 423 U.S. 874; *Narragansett Tribe v. Southern Rhode Island Land Dev. Corp.* (1976 D.R.I.) 418 F. Supp. 798, 805; *Oneida Indian Nation v. State of New York* (1982 2d Cir.) 691 F.2d 1070, 1083-84)

(footnote continued on following page)

ignores the very fundamental policy considerations which exist in a suit by the United States as opposed to an Indian tribe.

The United States, because of its unique position of public trust, historically has been entrusted with the traditional, although diminishing (*see, e.g.*, 28 U.S.C. § 2415), right of the sovereign to be free from the application of statutes of limitation, whether it sues on its own behalf (*United States v. Summerlin*, 310 U.S. 414, 416 (1940)) or in its role as a trustee[13] to protect restricted Indian property. *Board of County Comm'rs v. United States* (1940) 308 U.S. 343, 351.

Courts consistently have held that where the United States sues to enforce public rights in its role as a fiduciary or trustee, such an action is not subject to borrowed state limitations periods which would bar suits by individual beneficiaries to enforce identical rights. (*See, e.g., United States v. Fort Benning Rifle and Pistol Club* (1967 5th Cir.) 387 F.2d 884, 887 (The United States' subrogated right to recover medical expenses provided an injured person under the Medical Care Recovery Act, 42

committed the same errors. Although each court conceded that section 2415 was not intended to apply to suits by Indians, each concluded that it should nevertheless apply because it would be anomalous to apply a different limitations period. Their conclusions ignore the fact that if Congress did not intend section 2415 to apply, it must have intended some other limitations period to apply. See, *e.g., Adams v. Weeds* (1805) 6 U.S. (2 Cranch) 336, 342. As did the Second Circuit, they also erroneously concluded that Indian tribes stand in the shoes of the United States when they sue. These cases help explain the aberrant remarks in S. Rep. No. 96-569, *supra* n. 11, whch are contra to all other indicia of Congressional intent.

[13]There is nothing anomalous about a trustee being given a longer limitations period to assert a right than that given his beneficiary to assert the same right. For example, the Bankruptcy Code, 11 U.S.C. section 108, provides a trustee who steps into the shoes of a debtor a longer period of time to file a petition than that enjoyed by the debtor.



U.S.C. section 2651, *et seq.*, was not subject to the state statutes of limitations that would have barred the injured person's claim); *Nabors v. National Labor Relations Board* (1963 5th Cir.) 323 F.2d 686, 688-89 (Back pay claims brought by United States on behalf of private individuals were not barred by state statute of limitations applicable to private actions because the United States was suing to enforce public rights); *Securities and Exchange Comm'n v. Penn Central Co.* (1976 E.D. Pa.) 425 F. Supp. 593, 599 (SEC's suit to force disgorgement of money unlawfully obtained was not barred by state statutes of limitations that would apply to the individual investors because Commission was "acting in accordance with its public responsibilities on behalf of the public interest.").)

Here, the Second Circuit erroneously concluded that the Oneidas merely are asserting the *same* rights that the United States would have been asserting had it brought suit. The Oneidas, however, are suing to vindicate tribal interests, not the public interest that would have been represented by the United States had it sued.

The difference between what the United States views as its *public* interest in this suit as opposed to the *tribal* interest represented by the Oneidas is illustrated by the simple fact that the United States did not elect to sue in this case. Instead, the United States has indicated to the Oneidas that it believes that it fulfilled its duty to them by providing a forum (Indian Claims Commission) for determining whether they should be compensated for injuries allegedly sustained as a result of their early dealings with the State of New York. (JA 42a-44a).

The United States correctly views the public interest in this case as different from the Oneidas' interests. Unlike the Oneidas, the United States does not represent only a single segment of society. It is presumed to act

in the best interests of all people when it sues to enforce a public right.[14]

Thus in exercising its discretion not to sue in this case, the United States undoubtedly considered its trust responsibilities to the nation as whole and concluded that it would be inequitable to press 175-year-old claims against innocent parties where both it and the Indians had slept on their rights. The United States also may have believed that the problem should be resolved through the legislative process. In any event, its perception of the public interest led it to a decision not to sue.[15] Therefore it

[14]This fiduciary duty is best expressed in *Federal Indian Law* (1958 Dept. of Int.) 2:

> [N]othing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States.

[15]See Letter from Griffin Bell, Attorney General, to Hon. Cecil Andrus, Secretary of the Interior, June 30, 1978, S. Rep. No. 96-569, 96th Cong., 2d Sess. (1980) 12, 13, wherein the Attorney General gave the following reasons for not bringing suit against private parties on behalf of the Oneidas and other tribes:

> After careful thought, I have decided that I will not bring suit against the landowners in the New York, South Carolina, or Louisiana claim areas. I have a number of questions about the legal and factual issues in these suits and question whether they can be won. Furthermore, the fact that the landowners are completely innocent of any wrongdoing weighs heavily against suing them. Finally, the Administration's policy decision to relieve small landowners in Maine from suit through a legislative settlement recommends the same relief to others similarly situated.



is wrong to assume that the Oneidas merely are standing in the United States' shoes and asserting the United States' public interests. Only a private litigant would press his claim regardless of its inequitable impact on thousands of innocent people. A true sovereign has a duty to represent the public interest and must accordingly exercise restraint.[16]

**2. Absent an Express Federal Limitations Period, Federal Courts Apply Analogous State Statutes of Limitation.**

This Court has interpreted the Rules of Decision Act (RDA)[17] to require application of state statutory or common law rules unless otherwise required by the Constitution or federal statutes and treaties. *See Erie R.R. v. Tompkins* (1938) 304 U.S. 64, 78.

Courts initially held that where Congress was silent as to the applicable statute of limitations for a federally created right, the RDA mandated the borrowing of the most analogous state statute of limitations. *See e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*

[16]Unlike the United States, Indian tribes are not true sovereigns. Tribes may not exercise powers of autonomous states which are "inconsistent with their status." *Oliphant v. Suquamish Indian Tribe* (1978) 435 U.S. 191, 208. Their sovereignty exists only at the sufferance of Congress and is subject to complete defeasance. *United States v. Wheeler* (1978) 435 U.S. 313, 323. The modern trend has been to apply notions of Indian sovereignty only to the governing of existing reservation lands and tribal members. *Rice v. Rehner* (1983) ___ U.S. ___, 77 L.Ed. 2d 969-70. Here the Oneidas' limited sovereignty does not free them from statutes of limitations since such authority would be inconsistent with their status. Cf. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, supra* at 52 U.S.L.W. 4594 n30.

[17]The RDA, 28 U.S.C. section 1652, states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(1906) 204 U.S. 390; *Campbell v. Haverhill* (1895) 155 U.S. 610; *McCluny v. Silliman* (1830) 28 U.S. (3 Pet.) 270.

Modernly, Courts have abandoned the position that the RDA *compels* the application of state statutes of limitation. *See* Special Project, Time Bars In Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitation, 65 Cornell L. Rev. 1011, 1025-55 (1980). Instead, Courts have adopted the position that application of state limitations statutes is a matter of judicial discretion, controlled by the *presumption* that where Congress creates a cause of action without specifying a period for enforcement, it intends that the most analogous state limitations statute be applied. *United Parcel Service, Inc. v. Mitchell* (1981) 451 U.S. 56, 60-61; *Board of Regents v. Tomanio* (1980) 446 U.S. 478, 483-84; *Runyon v. McCrary* (1976) 427 U.S. 160, 179-82; *International Union, etc. v. Hoosier Cardinal Corp.* (1966) 383 U.S. 696; *Holmberg v. Armbrecht* (1946) 327 U.S. 392. Courts have carved out two exceptions to this general rule. First, a Court will not borrow a state limitations statute where the time period is so short that it emasculates underlying federal policies. *See, e.g., Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n* (1977) 432 U.S. 355, 367. Second, Courts will not borrow a state statute which discriminates against a federal right by providing a longer limitations period for an analogous state right. *See, e.g., Van Horn v. Lukhard* (1975 E.D. Va.) 392 F. Supp. 384, 389-91.

Here, the Second Circuit refused to borrow an analogous state limitations period because it erroneously believed such a period would be inconsistent with the federal policies underlying the 1793 Act. (JA 232a).



**3. Application of New York Limitations Statutes Would Not Be Inconsistent With the Alleged Federal Rights Asserted by the Oneidas.**

The Second Circuit stated that borrowing an applicable state limitations statute in this case would be inconsistent with the policies underlying the 1793 Non-Intercourse Act because it would allow a violation of the Act to go unremedied. The court's rationale, however, proves too much. Every statute of limitations operates to bar a claim. The Second Circuit's rationale would prevent the borrowing of state limitations statutes in any case involving federal claims.[18]

In *Board of Regents v. Tomanio* (1980) 446 U.S. 478, this Court borrowed both a state statute of limitations and a state tolling rule in finding that a plaintiff's 42 U.S.C. section 1983 action was time-barred. In concluding that the state statute of limitations would *not* be inconsistent with the federal policies underlying section 1983, merely because it barred the claim, the Court stated:

> "[A] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." [citation] Neither of [the] policies

[18]To the extent that the District Court believed that the supremacy clause prevented state defenses from barring federal claims (JA 73a), it ignored the fact that where Congress impliedly incorporates local limitations periods into a statute, the defense is itself part of federal law. *See, e.g.*, Special Project, *supra*, 65 Cornell L. Rev. at 1029 (The assumption "that a state [limitations] period may not operate . . . to limit a federal right . . . misconstrue[s] the operation of federal common law. Once a federal court fills a gap in federal law, the gap-filler, whether judicially-created or absorbed from the state, *becomes* federal law."

> [underlying 1983 — deterrence and compensation] is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years.

446 U.S. at 488.

Moreover, as the *Tomanio* Court also pointed out, the state policies of repose that underlie state limitations are consistent with the federal policies of repose that are implicit in every cause of action created by Congress where it does not expressly establish a limitations period:

> "The importance of policies of repose in the federal, as well as in the state, system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which is created, this Court has nonetheless 'borrowed' what is considered to be the most analogous state statute of limitations to bar tardily commenced proceedings. [citation] This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere creation of a 'cause of action' or 'claim for relief' that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established. Thus in general, state policies of repose cannot be said to be disfavored in federal law." (*Ibid.*)

Thus, the Second Circuit flatly misinterpreted this Court's holding in *Occidental Life Ins. Co., supra,* 432 U.S. at 367, that state statutes of limitations should not be borrowed where they are "inconsistent with the underlying policies of the federal statute."

All that the Court did in *Occidental* was for the first time give effect to this narrow exception to the general



rule.[19] The *Occidental* Court did not consider the state limitations statute inconsistent with the federal law merely because it barred the claim. Rather, it refused to borrow the state statute because as a practical matter the limitations period was too short to permit the EEOC to sue at all in many cases. By the time the typical EEOC charges had completed conciliation, the statute would have run. Application of such a short limitations period would have frustrated the underlying Congressional goal of conciliation and nullified the right Congress gave the EEOC to bring an action.

Since the *Occidental* decision, Courts have continued to give effect to the general rule that state statutes of limitations will be borrowed where Congress is otherwise silent. *See, e.g., United Parcel Service v. Mitchell, supra,* 451 U.S. at 60-61; *Board of Regents v. Tomanio, supra,* 446 U.S. at 488; *Fiesel v. Board of Education* (1980 E.D.N.Y.) 490 F. Supp. 363, 365; *Ashland Oil Co. v. Union Oil Co. of California* (1977 Em. Ct. App.) 567 F.2d 984, 989.

Here the most analogous state limitations periods are either ten[20] or six[21] years. There is no reason to believe that either period was too short to permit the Oneidas to bring whatever claims they might have under the 1793 Act.[22]

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[19]As Justice Rehnquist noted in his dissent:

> The Court does not now point to any case, not involving the United States in its sovereign capacity, in which, the federal statute being silent, the applicable state limitations period was disregarded in favor of either a judge-made limitations period or, as here, no limitations period at all. (432 U.S. at 375)

[20]N.Y. Civ. Prac. Law, section 212a (ten-year period for commencing action to recover property).

[21]N.Y. Civ. Prac. Law, section 213.1. (six-year period for action for which no limitation is specifically prescribed by law).

[22]In fact the Oneidas were well aware of their potential claims and protested to the United States at least as early as 1840 and "innumerable times" between 1909 and 1965. (JA 60a, 213a).

Thus, as in *Tomanio, supra*, the state statute of limitations is not inconsistent with any federal policies underlying the 1793 Act because the Oneidas could have enforced their claims simply by commencing their actions within the applicable time period. Moreover, the state policies of repose contained in the New York statute, like those in *Tomanio*, also are consistent with the federal policies of repose necessarily implicit in the 1793 Act.

Congress has evidenced its belief that similar or even shorter periods of time are ample to permit Indian claims such as the Oneidas' to be brought against the United States. Courts consistently have held that Indian land claims, when brought against the United States in United States Claims Court, are subject to the six-year limitation period in 28 U.S.C. section 2501. *See, e.g., Menominee Tribe of Indians v. United States, supra*, 726 F.2d at 720-22; *Fort Mojave Tribe of Indians* (1976) 210 Ct. Cl. 727; *Andrade v. United States, supra*, 485 F.2d at 604; *Capoeman v. United States, supra*, 440 F.2d at 1003-08. Courts also have subjected Indians to the two-year limitation of the Federal Tort Claims Act, 28 U.S.C. section 2401(b). *See, e.g., Mann v. United States, supra.* Both limitations periods are substantially shorter than the New York periods in this case; however, courts have not found that such time bars are inconsistent with any underlying federal policies toward Indians. These limitations periods are also evidence that there is no underlying federal policy of permitting Indian claims to be perpetual; there is a federal policy of repose with respect to such claims.

As Chief Justice Marshall observed in *Adams v. Weeds* (1805) 6 U.S. (2 Cranch) 336, 342, a case without a limitations period "would be utterly repugnant to the genius of our laws."[23]

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[23]From ancient times, the salutary rule has been recognized that there should come a time when mere *tempus fugit* wipes clean any preexisting old debts and obligations. (*Cf. Deuteronomy* 15:1, debts made uncollectible after seven years.)



## II.

## THE ONEIDAS' CLAIMS ALSO ARE BARRED BY LACHES AND OTHER EQUITABLE DOCTRINES.

The Second Circuit did not expressly address the issue of laches or the other equitable doctrines, apparently believing them subsumed in its statute of limitations discussion (JA 232a-33a). The district court: erroneously concluded that laches would not bar a similar suit brought by the United States (JA 72a); misread *Ewert v. Bluejacket* (1922) 259 U.S. 129, as holding that laches were inapplicable to individual Indian suits to rescind transfers of restricted Indian land (*Id.* at 73a); and, erroneously concluded that because the original transfer violated 25 U.S.C. Section 177 [sic, the 1793 Non-Intercourse Act] equitable doctrines such as laches could not validate the transaction. (*Ibid.*)

Courts, however, have applied equitable doctrines including laches against the United States when it sues on behalf of Indians. In *Ewert v. Bluejacket* this Court held merely that laches should not apply under the particular circumstances of that case, not that Indian land claims could *never* be barred by laches. The application of laches always has the effect of validating a challenged transaction regardless of whether it originally was void. Here, where there has been a 175-year delay and prejudice to innocent parties, laches should be applied.

### A. Contrary to the Lower Courts' Rulings, Courts Have Applied Laches and Other Equitable Defenses to Bar Indian Claims Brought by the United States.

Although *dicta* in various cases indicate that laches and other equitable defenses never bar the United States when it sues on behalf of Indians (*see, e.g., Board of Comm'rs v. United States* (1939) 308 U.S. 343, 351; *United States v. Ahtanum Irrigation Dist.* (1956 9th Cir.) 236 F.2d 231, 334 *cert. denied* (1956) 352 U.S. 988.), in fact, courts have applied laches and similar equitable

doctrines to prevent suit by the United States even when it sues on behalf of Indian tribes. *See, e.g., United States v. Title Ins. and Trust Co.* (1924) 265 U.S. 472, 485-87 (United States' suit on behalf of Mission Indians held barred on the grounds that the court should not overturn its earlier decision [in *Barker v. Harvey* (1901) 181 U.S. 482] which had become a rule of property in California); *United States v. Ft. Smith & W.R. Co.* (1912 8th Cir.) 195 F. 211, 215 (United States held bound by estoppel in suit to collect railroad right-of-way payments for Creek Nation); *Folk v. United States* (1916 8th Cir.) 233 F. 177, 191-93 (delay of more than eleven years barred United States from bringing action on behalf of Creek Nation); *United States v. Rose* (1937 W.D.N.C.) 20 F. Supp. 350, 353-54 (delay of more than forty-eight years barred United States from bringing suit on behalf of Eastern Band of Cherokee Indians); *see also United States v. Eaton Shale Co.* (1977 D. Colo.) 433 F. Supp. 1256, 1272 (United States suit to declare certain land patents void held barred by estoppel and laches where delay was twenty-one years after patent had issued).

**B. The Lower Court's Reliance on Ewert v. Bluejacket Is Misplaced.**

Contrary to the district court's opinion (JA 73a), *Ewert v. Bluejacket* (1922) 259 U.S. 129, does not hold that Indian claims can never be barred by laches and other equitable defenses. It merely follows the general rule that a defendant who has "unclean hands" may not invoke equitable defenses.

In *Ewert*, Bluejacket, a Quapaw Indian had received a patent for certain Oklahoma land in 1898.[24] In 1902, Congress passed a statute authorizing heirs of a deceased Indian to sell inherited lands subject to various restric-

[24]The patent contained a restriction that the property could not be alienated for twenty-five years.



tions including the approval of the Secretary of the Interior. Bluejacket died in 1907 and the land passed to his widow and children. In 1909, they sold the land to Ewert. In 1916 the widow and heirs sought to have the deed voided because at the time of the sale, Ewert had been employed as a special assistant attorney-general and had assisted the United States in suits relating to the Quapaw lands. A federal statute prohibited trading between "persons employed in Indian affairs" and the Indians.

This Court first held that the federal act disqualified Ewert from purchasing the land. The Court then stated:

> "He [Ewert] still holds the legal title to the land, and the equitable doctrine of laches, developed and designed to protect *good-faith* transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and bar the rights of Indian wards in lands subject to statutory restrictions." (259 U.S. at 138) (emphasis added)

The cases cited by the *Ewert* Court to support the above proposition did not involve Indians. Instead, all involved situations where the court had acted to apply or not to apply laches on equitable grounds.[25] The doctrine of clean hands certainly did not apply to Ewert. He, after all, had himself participated in the void act.[26] This

[25]*Galliher v. Cadwell* (1982) 145 U.S. 368, 372 (laches applied and 14 year old homestead right not permitted to disturb title to land); *Halstead v. Grinnan* (1894) 152 U.S. 412, 417 (laches applied to suit to set aside a 25 year old survey); *Northern Pacific R. Co. v. Boyd* (1913) 228 U.S. 482, 500 (laches held not applicable to 10 year delay of nonsecured creditor in attacking a reorganization plan where corporation and stock holders were not prejudiced and delay was excusable, if not avoidable).

[26]Ewert's activities were not limited to this one instance. *See Kendall v. Ewert* (1921) 259 U.S. 139 (decided the same day as

(footnote continued on following page)

"unclean hands" interpretation is supported by the fact that in deciding *Ewert v. Bluejacket,* this Court did not purport to overrule *Felix v. Patrick* (1892) 145 U.S. 317.

**C. In Felix v. Patrick This Court Applied Laches to Bar Indian Claims.**

In *Felix v. Patrick, supra,* Felix, a Sioux Indian, received scrip pursuant to a treaty which entitled her to 480 acres of land.[27] In 1860, certain unknown persons fraudulently obtained from Felix the scrip, a quit claim deed and a power of attorney in blank. In 1861, Patrick obtained the scrip and used it and the deed and power of attorney to obtain 120 acres of property.

In 1887 Felix' heirs sued Patrick to have the deed declared void. The United States Supreme Court affirmed the lower court's ruling that the action was barred by laches. In discussing Petitioner's argument that they could not be barred by equitable defenses such as laches because they had been tribal Indians, the Court stated:

> The real question is whether equity demands that a party who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous. In a court of equity, at least, the punishment should not

*Ewert v. Bluejacket*) (Court voided Ewert's attempts to obtain other Indian land through "straw man" procedures and by obtaining the consent of an Indian claimant who was a "habitual drunkard"). Certainly, the Court was in no mood to listen to any equitable defenses Ewert might have tried to assert.

[27]Similar to the case in *Ewert v. Bluejacket*, the treaty provided that no transfer or conveyance of the scrip would be valid. *See* 36 Stat. 458.



> be disproportionate to the offense, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands. (145 U.S. at 332-33)

The court then considered the equities including that Patrick (unlike Ewert) had not been a party to the fraud (*Ibid*) and that there had been no showing that Felix had not received full value for the scrip (*Ibid*). The Court, in affirming the judgment, stated:

> It is very evident that Patrick bought these muniments of title as hundreds of others bought them — in violation of the letter and policy of the law, but without actually intending to defraud Sophia Felix or any other person. The law pronounces the transaction a fraud upon her but it lacks the element of wickedness necessary to constitute moral turpitude. If there had been a deliberate attempt on his part to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief at any time during the life of either of the parties; but as the case stands at present justice requires only what the law, in the absence of the statutory limitation would demand — the repayment of the value of the scrip with legal interest thereon. (*Id.* at 334)

The Court also was concerned that a contrary decision would "result in the unsettlement of larger numbers of titles upon which owners have rested in assured security for nearly a generation." (*Id.* at 335.)[28]

[28]Obviously if the Oneida claims are upheld, the results in this case would be even more disastrous.

**D. Since Ewert, Courts Have Continued to Apply Laches to Bar Indian Claims.**

After *Ewert,* courts continued to bar Indian claims on laches grounds. *See, e.g., Lemieux v. United States* (1926 8th Cir.) 15 F.2d 518, 523 (court held that the facts of the case together with the passage of 35 years barred Lemieux, a Chippewa Indian from maintaining suit to recover allotment); *Barnett v. Riggs National Bank* (1957 D.D.C.) 154 F. Supp. 75, 78 (suit brought to set aside Indian trust barred after delay of 29 years); *Andrade v. United States, supra,* 485 F.2d at 665 (Pitt River tribe suit to overturn Indian Claims Commission judgment barred by 28 U.S.C. section 2501 and by laches); *Armstrong v. Maple Leaf Apartments Ltd.* (1979 10th Cir.) 622 F.2d 466, 471-74, *cert. denied* (1980) 449 U.S. 901 laches applied to bar Indian suit to set aside deed by applying 1947 statute).

More recently, in *Jicarilla Apache Tribe v. Andrus* (1982 10th Cir.) 687 F.2d 1324, an Indian tribe sued the Secretary of the Interior and oil and gas lessees alleging that Interior had failed to comply with its regulations when advertising oil and gas leases on their reservation, and that it had failed to comply with the National Environmental Policy Act (NEPA). The district court awarded the tribe damages for violation of Interior's regulation; however, it rejected the tribe's NEPA claims on a finding of laches and unclean hands on the part of the tribe. The parties appealed.

On appeal, the Tenth Circuit affirmed that the tribe's NEPA claims were barred by laches. The court began its analysis by noting:

> The question whether laches bars an action depends on the facts and circumstances of each case. The issue is primarily left to the discretion of the trial court, but that discretion is, of course, confined by



> recognized standards. . . . The trial court must find (a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense as a result of this delay.

687 F.2d at 1338.

The Court next found that the tribe had unreasonably delayed bringing suit by waiting more than three years to bring the action. (*Ibid.*)

The Court also rejected the tribe's claim that the suit should be found timely filed. The tribe claimed that they had been ignorant of the NEPA violations and had relied on the Bureau of Indian Affairs and that the United States had a fiduciary duty to protect their land.

The Court concluded that the tribe's delay had prejudiced the lessees and quoted from the lower court's decision:

> [T]he delay resulted in prejudice to the lessee defendants. Because they had no notice that anything was amiss with their Jicarilla leases until the institution of this suit, they have invested well over $12 million in leases in the form of bonus payments, rentals, administrative overhead costs, plus exploration, drilling and production costs. Were they to lose their leases, much of that investment would be lost, not to mention the loss of future profits based on investments already made.

*Id.* at 1339.[29]

*See also Peshlakai v. Duncan* (1979 D.D.C.) 476 F. Supp. 1247, 1256 (laches barred claim by 72 Navajo Indians that a seven-year-old sale of uranium exploration and mining leases on Navajo lands by the Bureau of

[29]Here the delay was not 3 years, but 175 years. The potential prejudice to innocent parties from this suit is not 12 million dollars, but some huge multiple of that amount.

Indian Affairs was illegal for failure to prepare an environmental impact statement in accordance with NEPA); *Western Shoshone Legal Defense and Education Ass'n v. United States* (1976 Ct. Cl.) 531 F.2d 495, 503 (laches prevented an Indian legal defense and education association from intervening in claim proceeding before the Indian Claims Commission for taking of land where association had waited 39 years before intervening).

The above cases establish that, at the very least, equitable defenses such as laches and estoppel should not be dismissed as a matter of law without analyzing the facts.[30] *Cf. Covelo Indian Community v. Watt* (1982 D.C. Cir.) 551 F. Supp. 366, 381 (court refused to apply laches to bar Indian class action seeking damages for federal government's failure to abide by federal statute relating to Indian claims only after examining the equities on both sides); *Ute Indian Tribe v. Probst* (1970 10th Cir.) 428 F.2d 491, 496-97 (court found laches inapplicable where delay was only three years and no prejudice was shown).

**E. Application of Laches Is Appropriate in This Case.**

It is difficult to imagine a more appropriate case than this one in which to apply the doctrine of laches. Here there has been patently unreasonable delay — 175 years — with no excuse given or even conceivable. The prejudice to defendants is obvious. Much of what was then wild land is now intersected by streets, subdivided into blocks and lots and occupied by innumerable innocent purchasers. Land titles believed to be settled for more than one and one half centuries will be disrupted; innocent home owners and businesses may be forced from

[30] *Cf., United States v. Ruby Co.* (1978 9th Cir.) 588 F.2d 697, 701-703, *cert. denied* (1979) 442 U.S. 917 (court of appeals concluded that district court erred when it concluded as a matter of law that estoppel was inapplicable).



their land. The potentially staggering award of damages will be borne by innocent taxpayers.

Unlike in *Ewert v. Bluejacket, supra,* this is not a case where the wrongdoer seeks to have his own illegal contract validated by the passage of time. Here, the Counties did not even exist at the time the challenged conveyances were made. Their hands are clean. They are entitled to evoke the defense of laches.

Here, as in *Felix v. Patrick, supra,* the individuals who participated in the land transaction died years ago. Just as modern Indian tribes are not held responsible for depredations which occurred decades ago, the citizens of New York State also should not be held responsible for any alleged wrongs committed by their agents and representatives almost 200 years ago.[31]

[31] U.S. Const. Art. III, sect. 3, cl. 2 — even in cases of treason, any punishment or forfeiture ends with the death of the traitor.

**Conclusion.**

This Court has yet to expressly address whether a borrowed state statute of limitations or laches can bar ancient Indian land and damage claims. Under the Second Circuit decision Indian claims can never be barred no matter how old they are or inequitable it may be to enforce them. This Court should not sanction such a pernicious doctrine.

There has been no showing that these Indians could not have brought their claims decades ago. See, *e.g.*, *Cherokee Nation v. Southern Kansas Ry.* (1890) 135 U.S. 641. Nevertheless the Oneidas slept on their rights until 1970 without apparent excuse. No other citizen or group in this country would be allowed to assert such stale claims.

Respectfully submitted,

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